

Message Text

PAGE 01 STATE 099768

72

ORIGIN L-02

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TO ALL DIPLOMATIC AND CONSULAR POSTS

UNCLAS STATE 099768

INFORM CONSULS

E.O. 11652:N/A

TAGS: OGEN AFOI

SUBJECT:AMENDED FREEDOM OF INFORMATION (FOI) ACT

REF: A. STATE 34353 G. MONTEVIDEO 717 NOTAL

B. STATE 36519 H. CAPE TOWN 195 NOTAL

C. DEPT'S A-1089 I. BRASILIA 1616

D. STATE 37796 J. ASUNCION 725

E. STATE 36695 K. ALGIERS 505

F. ADDIS ABABA 2617 NOTAL

1. IN RESPONSE TO QUESTIONS POSED CONCERNING REFERENCED
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PAGE 02 STATE 099768

COMMUNICATIONS A, B, C, D, AND E, DEPARTMENT OFFERS
FOLLOWING EXPLANATION OF SUBJECT FOI ACT WITH REGARD
EXEMPTIONS FROM PUBLIC ACCESS TO RECORDS AND EXEMPTIONS
FROM DECLASSIFICATION, CITIZENSHIP OF THE PERSON MAKING

A REQUEST AND SPECIFICITY OF REQUESTS.

2. THE NINE EXEMPTIONS FROM PUBLIC ACCESS TO RECORDS MENTIONED IN PARA 4 OF REF B ARE SET FORTH IN THE ENCLOSURE TO REF C AT SECTION 6.4 WHICH IS ESSENTIALLY A QUOTATION TAKEN DIRECTLY FROM THE FOI ACT (5 USC SECTION 552(B)). THEY ARE NOT TO BE CONFUSED WITH THE FOUR EXEMPTIONS FROM THE GENERAL SCHEDULE OF DECLASSIFICATION DISCUSSED IN REF D AND SET FORTH IN 5 FAM 924 WHICH QUOTED FROM SECTION 5(B) OF EXECUTIVE ORDER 11652. AMONG THE NINE EXEMPTIONS IN THE FOI ACT IS EXEMPTION ONE WHICH

PERMITS MATTERS TO BE KEPT SECRET FROM PUBLIC ACCESS IF PROPERLY CLASSIFIED PURSUANT TO AN EXECUTIVE ORDER IN THE INTEREST OF NATIONAL DEFENSE OR FOREIGN POLICY. EXECUTIVE ORDER 11652 IS THE BASIS FOR APPLYING EXEMPTION ONE, AND IT PROVIDES IN TURN FOR A GENERAL DECLASSIFICATION SCHEDULE (GDS) IN SECTION 5(A) AND FOR THE FOUR EXEMPTIONS FROM GDS FOUND IN SECTION 5(B).

3. ANY ONE OF THE FOUR EO 11652 EXEMPTIONS, I.E., XGDS 1, 2, 3, AND 4, BY ITSELF SUFFICES TO EXEMPT INFORMATION OR MATERIAL FROM THE GENERAL DECLASSIFICATION SCHEDULE. REF D PLACED SPECIAL EMPHASIS ON THE NECESSITY OF MAKING XGDS 1 NOTATION WHERE APPROPRIATE BECAUSE DEPT WISHES TO TAKE EVERY PRECAUTION IN PROTECTING SUCH CONFIDENTIAL COMMUNICATIONS AND BECAUSE DETERMINING WHERE SUCH XGDS 1 INFORMATION BEGINS AND ENDS CAN PROVE DIFFICULT WITHOUT APPROPRIATE INDICATORS.

4. DEPT BELIEVES THAT XGDS 1 DESIGNATION MAY BE GIVEN INFORMATION OR MATERIAL FURNISHED TO THE USG BY FOREIGN GOVERNMENT OR INTERNATIONAL ORGANIZATION OFFICIALS ON THE UNDERSTANDING THAT SUCH WILL BE KEPT BY THE USG IN CONFIDENCE IF ITS UNAUTHORIZED DISCLOSURE WOULD BE

EXPECTED TO CREATE THE DAMAGE TO FOREIGN RELATIONS SET UNCLASSIFIED

PAGE 03 STATE 099768

FORTH IN SECTION 1 OF EO 11652 AND 5 FAM 924. THOUGH EACH CASE WILL TURN ON ITS PARTICULAR FACTS, DEPT BELIEVES THAT SUCH INFORMATION OR MATERIAL SHOULD INCLUDE, BUT NOT BE LIMITED TO, PERSONAL OPINIONS AND PRIVATE VIEWS AS WELL AS OFFICIAL OPINIONS AND CLASSIFIED DOCUMENTS PROVIDED BY ANY OFFICER AND STAFF MEMBER OF THE EXECUTIVE, LEGISLATIVE AND JUDICIAL BRANCHES OF THE CONCERNED GOVERNMENT OR INTERNATIONAL ORGANIZATION ON A CONFIDENTIAL BASIS. DEPT BELIEVES THAT DAMAGE FROM DISCLOSURE OF SOURCE CAN BE BASIS FOR CLASSIFICATION EVEN IF SUBSTANTIVE CONTENT ALONE IS NOT SUFFICIENT. IT IS DIFFICULT TO HYPOTHESIZE FACTUAL CIRCUMSTANCES IN WHICH APPROPRIATE INFORMATION OR MATERIAL FROM

ACADEMICIANS, JOURNALISTS, AND BUSINESSMEN COULD BE EXEMPTED FROM THE GENERAL DECLASSIFICATION SCHEDULE UNDER XGDS 1; IN SUCH CASES REPORTING OFFICERS SHOULD CONSIDER POSSIBILITY OF XGDS 3, I.E., "CLASSIFIED INFORMATION OR MATERIAL DISCLOSING A SYSTEM, PLAN, INSTALLATION, PROJECT OR SPECIFIC FOREIGN RELATIONS MATTER THE CONTINUING PROTECTION OF WHICH IS ESSENTIAL TO THE NATIONAL SECURITY." HERE, OBVIOUSLY, SUBSTANTIVE CONTENT OF INFORMATION HAS TO PLAY MAJOR ROLE. SEE ALSO XGDS 2 AND XGDS 4. THERE PROBABLY IS AN INTERMEDIATE

GROUP OF SOURCES WHO ARE NOT IN GOVERNMENT BUT WHOSE STATURE WOULD PRODUCE SAME KIND OF DAMAGE TO FOREIGN RELATIONS IF INFORMATION GIVEN IN CONFIDENCE WERE DISCLOSED, E.G., PRINCIPAL OPPOSITION PARTY CANDIDATE FOR HIGH OFFICE. IN SUCH CASES XGDS 1 AND/OR XGDS 3 MAY BE APPROPRIATE.

5. IT IS TRUE IN AT LEAST TWO CASES THAT THE DESIGNATOR GDS (GENERAL DECLASSIFICATION SYSTEM) OR SPECIFIC TIME FOR DECLASSIFICATION IN LIEU OF GDS MAY BE SET ASIDE AND THE DOCUMENT SO DESIGNATED RELEASED TO PUBLIC BEFORE EXPIRATION OF DECLASSIFICATION PERIOD IN THE COURSE OF ADMINISTRATIVE AND/OR LEGAL PROCEDURES IN RESPONDING TO A REQUEST FROM THE PUBLIC FOR A DOCUMENT. THE FIRST CASE WOULD OCCUR WHEN A CLASSIFIED DOCUMENT MAY NO LONGER BE KEPT SECRET IN THE INTEREST OF NATIONAL DEFENSE OR FOREIGN POLICY, E.G., THE DOCUMENT IS UNCLASSIFIED

PAGE 04 STATE 099768

PUBLISHED IN A LOCAL NEWSPAPER PRIOR TO THE EXPIRATION OF THE GDS OR DECLASSIFICATION PERIOD. THE SECOND CIRCUMSTANCE WOULD OCCUR IF A US COURT SHOULD ORDER THE DECLASSIFICATION OF THE DOCUMENT AS DESCRIBED IN PARA 6.7 OF REF B, BUT DEPT WISHES TO EMPHASIZE THAT IF OUR CASE IS STRONG ENOUGH TO FIGHT IN COURT AT ALL (AND HERE IS WHERE INDICATORS, DESCRIPTION OF CIRCUMSTANCES, PROPER CLASSIFICATION PROCEDURES AND INITIAL GOOD JUDGMENT CAN HELP), THE DECLASSIFICATION AND RELEASE OF THE DOCUMENT WOULD NOT OCCUR UNTIL APPELLATE REVIEW OF SUCH A COURT ORDER HAD BEEN COMPLETED. DURING SUCH APPELLATE REVIEW, THE REQUESTED DOCUMENTS WOULD REMAIN SEALED AND COVERED BY A PROTECTIVE ORDER OF THE COURT WITH VIOLATIONS SUBJECT TO CONTEMPT PROCEEDINGS. DEPT NOTES AS WELL THAT A RECENT COURT OF APPEALS DECISION, NOT INVOLVING AN FOI ACT REQUEST BUT TAKING ACCOUNT OF THE NEW LANGUAGE IN EXEMPTION PROVIDING IN CAMERA INSPECTION, GIVES SOME SUPPORT FOR OUR VIEW THAT THERE WILL BE JUDICIAL RESTRAINT IN THE FIELD OF NATIONAL SECURITY INFORMATION AND FOR THE APPROPRIATENESS OF JUDICIAL DEFERENCE TO CLASSIFICATION DECISIONS MADE AND REVIEWED ADMINISTRATIVELY IN ACCORDANCE WITH

E.O. 11652.

6. DEPT RECOGNIZES AS OUTLINED IN PARA 2 OF REF E THAT AID PROCEDURES RESTRICT FORMAL FOI REQUESTS MADE OF AN AID MISSION DIRECTOR TO THOSE PRESENT "ONLY BY AN AMERICAN CITIZEN PHYSICALLY PRESENT IN THE COUNTRY WHERE THE MISSION IS LOCATED" WHILE SECTION 6.11 OF THE ENCLOSURE TO REF C MAKES NO DISTINCTION BETWEEN REQUESTS MADE OF THE DEPT OF STATE ABROAD BY AMERICAN CITIZENS AND NON-CITIZENS. DEPT WISHES TO POINT OUT, HOWEVER,

THAT, LIKE STATE, AID REGULATION MAKES NO DISTINCTION BETWEEN AMERICAN CITIZENS AND NON-CITIZENS AS TO REQUESTS MADE TO THE DIRECTOR, OFFICE OF PUBLIC AFFAIRS, AID, DEPT OF STATE, 21ST AND VA. AVENUE, N.W., WASHINGTON, D.C. 20523. WHEREAS USAID REGULATIONS PROVIDE THAT REQUESTS BY AMERICAN CITIZENS ONLY WILL BE ACCEPTED BY THE USAID MISSION DIRECTOR, STATE DEPT REGULATIONS PROVIDE THAT ALL SUCH REQUESTS WHETHER BY AMERICAN UNCLASSIFIED

PAGE 05 STATE 099768

CITIZEN OR NON-CITIZEN WILL BE TRANSMITTED TO THE DIRECTOR, FREEDOM OF INFORMATION STAFF, BUREAU OF PUBLIC AFFAIRS, IN WASHINGTON. DISTINCTION IN PROCEDURE PERMITTING USAID MISSION DIRECTOR TO RELEASE MATERIAL WHICH HE DOES NOT BELIEVE SHOULD BE EXEMPT FROM DISCLOSURES IS BASED PRIMARILY ON THE DIFFERENT TYPE OF MATERIAL WHICH USAID GENERALLY HANDLES AS OPPOSED TO THAT PROCESSED BY STATE. THE LANGUAGE OF THE FOI ACT ITSELF DOES NOT DRAW ANY DISTINCTION BETWEEN CITIZENS OR NON-CITIZENS. IT SEEMS CLEAR THAT ANYONE SUBJECT TO US LAW - WHICH WOULD INCLUDE FOREIGN RESIDENTS IN US - MAY TAKE ADVANTAGE OF THE ACT; WHETHER FOREIGN NATIONALS NOT REPEAT NOT RESIDENT IN US CAN ALSO DO SO IS MUCH LESS CLEAR.

7. THOUGH REQUEST FOR DOCUMENTS MAY BE BROAD, DEPT MUST ENDEAVOR TO FACILITATE REQUESTS FOR DOCUMENTS WITHOUT GOING SO FAR AS TO DRAFT DOCUMENTS IN RESPONSE TO

REQUESTS. WHEN A BROAD REQUEST IS RECEIVED, DEPT OFFICER NORMALLY ADVISES REQUESTER BY PHONE WHEN FEASIBLE OF NATURE AND SCOPE OF RECORDS AND SEARCH COSTS WHICH MAY BE ENTAILED, AND SEEKS TO HELP REQUESTER DEFINE REQUEST MORE SHARPLY AND/OR SUBDIVIDE IT INTO MANAGEABLE COMPONENTS. SUCH AN APPROACH IS PRACTICAL IN MOST CASES ONLY FROM WASHINGTON. WHEN POST RECEIVES SUCH REQUEST, DEPT SUGGESTS POST ATTEMPT ASSIST REQUESTER DEFINE REQUEST MORE PRECISELY, BUT THAT, IF SUCH IS NOT FEASIBLE, POST REFER REQUEST ASAP TO DEPT IN CARE OF DIRECTOR, OFFICE OF PUBLIC AFFAIRS (PA/FOI) FOR HANDLING.

8. DEPT UNDERSTANDS THAT OTHER AGENCIES SUCH AS CIA, DEFENSE AND USIA PROVIDING GUIDANCE RE FOI ACT IMPLEMENTATION UNDER REGULATIONS AND PROCEDURES DRAFTED BY THOSE AGENCIES. IF AN INQUIRY IS RECEIVED BY A DIPLOMATIC OR CONSULAR POST WHICH TREATS AN AGENCY WHICH HAS NOT PROVIDED SUCH GUIDANCE, POST SHOULD FORWARD SUCH INQUIRY TO WASHINGTON FOR TRANSMISSION TO DEPT CONCERNED ASAP. THE DEPT SHOULD IN ALL CASES BE AN ACTION OR INFORMATION ADDRESSEE ON SUCH MESSAGES.

UNCLASSIFIED

PAGE 06 STATE 099768

9. REFERENCE TO DEPTTEL STATE 36461 IN REF C WAS IN ERROR. DEPTTEL SHOULD HAVE BEEN REF A KISSINGER

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<< END OF DOCUMENT >>

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